

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: DIV 155/2014

In the matter between:

K[...] B[...] P[...]

Plaintiff

and

T[...] L[...] P[...]

Defendant

DATE OF HEARING : 27 FEBRAURY 2024

DATE OF JUDGMENT : 17 APRIL 2024

FOR THE PLAINTIFF : MR KRUGER
FOR THE DEFENDANT : MR MOLOTO

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date and time for hand-down is deemed to be 10h00 on 17 April 2024.

ORDER

Consequently, the following order is made:

- (i) A decree of divorce is granted.**
- (ii) Division of the joint estate on the basis that the plaintiff retains as her exclusive property the house situated at [...] (the property) and the defendant retains as his exclusive property the Toyota Tazz. Furthermore, each party retains the movable assets currently in his/her possession.**
- (iii) The defendant is ordered to pay half of the water and rates bill of the Mahikeng Local Municipality for the abovementioned property, as at the date of this order, being 17 April 2024.**

- (iv) Joint parental rights and responsibilities are awarded to both parties, and the primary care and residence of both children would rest with the Plaintiff, subject to the Defendant's right of reasonable access and contact.**
- (v) The defendant is ordered to pay maintenance in respect of the two (2) children in the amount of R1500.00 per month per child. In total R3000-00 per month.**
- (vi) The defendant is ordered to pay an amount of R324 000.00 to the plaintiff as arrear maintenance for the two (2) children.**
- (vii) Both parties (plaintiff and defendant) are entitled to half of the pension fund benefits of each other, as at the date of this order, being 17 April 2024.**
- (viii) The plaintiff's pension fund is Netcare 1999 Provident Fund [administered by Alexander Forbes Provident Fund] Member number [...]. Employee number:[...]. The defendant's pension fund is the Government Employees Pension Fund (GEPF) with membership number [...].**
- (ix) That the plaintiff is ordered to pay an amount of R463 156.00 to the defendant, as his half share of the plaintiff's previous pension fund benefit of R926 312.15.**
- (x) The defendant is liable to a contribution of fifty percent (50%) towards both children's medical, orthodontic, prescribed**

pharmaceuticals and similar expenses, and shall retain both children on his medical aid scheme.

- (xi) The defendant is liable to a contribution of fifty percent (50%) of both children's tuition fees, book fees, uniform, transport costs and costs for extra-mural activities.

JUDGMENT

HENDRICKS JP

Introduction

[1] This is an opposed divorce. The plaintiff, **Mrs B[...] P[...]**, and the defendant, **Mr L[...] P[...]**, got married in community of property, on the 11th December 2010, which marriage still subsist. Two (2) children were born from this marriage relationship now aged eighteen (18) years and thirteen (13) years respectively. These children are both attending school doing Grade 11 and Grade 8 respectively, and are still dependent. A house was acquired by the plaintiff which is registered in her name, and she pays the monthly instalments of the bond for it. The bond repayment is R3 500,00 per month. The outstanding bond amount is between R140 000,00 and R150 000,00. The defendant never paid a single instalment on the bond of the house. The Municipal market value of this house is R476 000,00. They had two (2) motor vehicles before they separated, to wit a Chevrolet Cruze and a Toyota Tazz. The Chevrolet Cruze was

repossessed, and the defendant collected the Toyota Tazz from the plaintiff and it is currently in his possession. The estimated value of the Toyota Tazz is between R30 000,00 and R35 000,00, and it is paid up. The registration letters and numbers as well as the engine and chassis numbers of the Toyota Tazz is not provided.

[2] During 2015 the defendant moved out of the common home and he is currently cohabiting with another woman, his girlfriend. The plaintiff was employed as a professional nurse in the North West Province, but had to resign due to financial constraints. Her net pension fund benefits pay-out was in the amount of R926 312,15. This money she used to renovate the common house and to maintain herself as well as their children. She did not give any of this money to the defendant. She relocated to Krugersdorp in 2013 and she left her brother in the house to take care of it, out of fear that it may be vandalized. She took up employment at Netcare Krugerdorp Hospital and earn a monthly salary income of approximately R29 000,00. As at 28th February 2022, some two (2) years ago, her current pension fund benefits were at R207 131,88. This amount will be more as at the date of this judgment and order, being 17 April 2024.

[3] The defendant is a police officer in the employ of the South African Police Service (SAPS) for the past thirty-three (33) years. He is currently holding the rank of Warrant Officer. He earns a gross income of approximately R28 900,00 per month. His pension fund

benefits is in excess of R2 639 250,00, indicated as a resignation benefit. He did not pay any maintenance towards the defendant and their children. Occasionally he would provide as and when they require something from him. He frankly stated that for more than nine (9) years, he did not maintain them. He does not deny that it was and currently still is his responsibility to maintain their children, which he failed to do. Both the plaintiff and the defendant are *ad idem* that the defendant should pay maintenance for the two (2) children in the amount of R1500,00 per month per child, totaling R3 000,00 per month.

[4] The defendant want the plaintiff to forfeit the amount of his pension fund benefit, which she is entitled to receive, as she did not pay him his half share of her pension fund benefits. As alluded to earlier, the pension fund payout amounted to R926 312.15. According to him, the house can be retained for their children, although he never paid a single instalment on it. The water and rates bill for the common house was during May 2023 an amount of R246 188,76. As at date of this judgment and order, it may well be more than that amount. The Plaintiff contended that half of the water and rates bill that is in excess of R246 188,76, must be paid by the defendant.

[5] Insofar as the marriage relationship is concerned, both the plaintiff and defendant are in agreement that it has broken down irretrievably. Furthermore, that there exists no possibility for reconciliation and the

marriage can therefore not be saved, despite their best-efforts, including consultations with the elders of the respective families.

[6] The bone of contention is the entitlement of both parties to each other's pension fund benefits, and the fact that the defendant failed to pay maintenance for their children. The testimony by the plaintiff that she used her pension fund pay-out of R926 312.15 for renovating the common home, and as maintenance for herself and their children, was not gainsaid. It is trite that both the plaintiff and defendant are entitled to fifty percent (50%) of each other's pension fund benefits as at the time of divorce. As alluded to, the defendant contend that he did not share in the pension fund benefits pay-out of the plaintiff in the amount of R926 312,15. That he was entitled to half of it behoves no argument. This amounts to R463 156,00 (the fifteen (15) cents left out of the equation).

See: N v N and Another (9417/2019) [2022] ZAGPJHC 714 (21 September 2022) in which the following is stated:

*"[19] The provisions of the **Divorce Act 70 of 1979** provide in **sections 7 (7)** and (8) the following:*

'(7)(a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets....

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-

*(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that –
(i) any part of the pension interest of that member which by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;'*

[20] *The natural consequence of a marriage in community of property is that both spouses would benefit by the division of the joint estate. A forfeiture order may not be granted simply to balance factually that one spouse had made a greater contribution than the other spouse to the joint estate. In **V v V**, the wife claimed forfeiture because her husband did not contribute to her pension fund or the mortgage bond. She took the view that her husband would be unduly benefitted if forfeiture was not granted because of his misconduct during the marriage. However, she failed to prove the misconduct and the order for forfeiture was not granted. The fact that the husband did not contribute to the pension fund or the bond account did not mean that he would be unduly enriched at the expense of the wife if the order was not granted. It was held that the husband benefiting by the division of the joint estate is a natural consequence of a marriage in community of property, which both parties willingly contracted into.*

[25] *... In **Wijker** it was held that conduct must be “so obvious and gross that it would be repugnant to justice to let the guilty spouse get away with the spoils of the marriage.” There is no evidence in this matter to show the Plaintiff’s*

conduct being so obvious and gross that to allow her to share in the community of property will just be repugnant and unjust.

[26] ... In **Wijker** the court pointed out that in a marriage in community of property one spouse shares in the other's successful ventures is a consequence of the matrimonial property system. In any event the duty of support is entrenched in marriage irrespective of the matrimonial property system.

See: **Wijker v Wijker** 1993 (4) SA 720 (A)

K.W.M. v P.J.M. (14861/2018) [2023] ZAGPPHC 48 (31 January 2023)

[7] The defendant is now entitled to half of the current pension fund benefits of the plaintiff, which is in excess of R207 131,88. A half share amounts to R103 565,00 (the eighty-eight (88) cents left out of the equation). It will be just, fair and equitable that the amount of R463 156.00 be set-off against the half share of the pension fund benefits that the plaintiff are entitled to, of the defendant's pension fund benefits. To reiterate, the defendants' pension fund benefits are now in excess of R2 639 250,00, and half of it amounts to R1 319 625,00. Therefore, the amount of R463 156,00, being a half share of the previous pension fund benefit of the plaintiff, must be set-off against the amount of R1 319 625,00. This is logical mathematics.

[8] Furthermore, the fact the defendant failed and/or neglected to maintain his children for a period in excess of nine (9) years cannot be ignored. The plaintiff testified that she maintained their children alone. This was conceded to by the defendant, although he stated that he occasionally gave the children what they required from him. The defendant will unduly benefit if his failure to pay maintenance for nine (9) years is ignored. R3 000,00 per month for nine (9) years equates to R324 000,00. This means that the defendant will benefit the amount of R324 000,00, which he did not pay as maintenance for nine (9) years, at the agreed rate of maintenance for their children. This amount must be taken into account. In order not to create a conundrum, it will be just, fair and equitable to allow the plaintiff her half share of the defendant's pension fund benefits which is in excess of R1 319 625,00. The amount of R463 156,00, (which will be more as at the date of this judgment and order) being the half share of the defendant's entitlement in the plaintiff's pension fund benefits payout, be set-off. That means that both the plaintiff and the defendant are entitled to a half share of each other's pension fund benefits.

[9] Furthermore, the defendant should be ordered to pay half of the water and rates bill of the Mahikeng Local Municipality, as at the date of the divorce. The house (property) should remain the sole property of the plaintiff. The defendant should also pay maintenance for the children in the amount of R1 500,00 per month per child, totaling R3 000,00 per month.

Order

[10] Consequently, the following order is made:

- (i) A decree of divorce is granted.
- (ii) Division of the joint estate on the basis that the plaintiff retains as her exclusive property the house situated at [...](the property) and the defendant retains as his exclusive property the Toyota Tazz. Furthermore, each party retains the movable assets currently in his/her possession.
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- (v) The defendant is ordered to pay maintenance in respect of the two (2) children in the amount of

R1500.00 per month per child. In total R3000-00 per month.

- (vi) The defendant is ordered to pay an amount of R324 000.00 to the plaintiff as arrear maintenance for the two (2) children.**
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- (viii) The plaintiff's pension fund is Netcare 1999 Provident Fund [administered by Alexander Forbes Provident Fund] Member number [...].Employee number: [...]. The defendant's pension fund is the Government Employees Pension Fund (GEPF) with membership number [...].**
- (ix) That the plaintiff is ordered to pay an amount of R463 156.00 to the defendant, as his half share of the plaintiff's previous pension fund benefit of R926 312.15.**
- (x) The defendant is liable to a contribution of fifty percent (50%) towards both children's medical, orthodontic, prescribed pharmaceuticals and similar expenses, and shall retain both children on his medical aid scheme.**

- (xi) The defendant is liable to a contribution of fifty percent (50%) of both children's tuition fees, book fees, uniform, transport costs and costs for extra-mural activities.**

**R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG**